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IN THE

Supreme Court of the United States

SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

v.

SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF *AMICUS CURIAE* OF WESTMINSTER THEOLOGICAL SEMINARY IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES CORP.

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QUESTIONS PRESENTED

Do Hobby Lobby and Conestoga have free exercise rights that are protected under the Religious Freedom Restoration Act?

Does the regulatory Mandate promulgated by the Departments of Health & Human Services, Labor and Treasury that requires non-exempted employers to take action to provide their employees cost-free access to abortifacient drugs and devices contravene such employers' right to free exercise under the Religious Freedom Restoration Act when such employers oppose providing that access on the basis of their undisputed good faith religious convictions?

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INTEREST OF THE *AMICUS*[1]

Westminster Theological Seminary ("Westminster") is an exclusively graduate level Christian seminary in the Reformed tradition. It is opposed on the basis of its religious faith to taking any action to make abortifacients available to its employees, but, because it is neither a church nor an integrated auxiliary of a church, it is obligated to do so by the Mandate imposed by the regulatory Final Rule[2] to which Hobby Lobby and Conestoga also object. Westminster has brought its own legal challenge in the United States District Court for the Southern District of Texas, Houston Division seeking protection from enforcement of the Mandate against it on the basis of the same statute and constitutional provisions that have been raised by the for profit employers in these matters.[3]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. All of the parties, other than Hobby Lobby Stores, Inc., have filed blanket waivers with the Court consenting to the submission of all amicus briefs. The consent of Hobby Lobby Stores, Inc. is submitted herewith.

2. 45 C.F.R. 147.130(A)(1)(IV) (HHS); 29 C.F.R. 2590.715-2713(A)(1)(IV) (Labor); 26 C.F.R. 54.9815-2713(A)(1)(IV) (Treasury) (collectively, the "Final Rule").

3. On December 27, 2013, that Court granted Westminster's motion for summary judgment on RFRA grounds and enjoined the government defendants from enforcing the Mandate against Westminster or its insurers. Case 4:12-cv-03009 Documents 133 and 134.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Westminster submits this *Amicus Curiae* Brief (a) in support of religious liberty, (b) in opposition to the intrusion on such liberty imposed by the Final Rule's requirement that Westminster, as well as Hobby Lobby and Conestoga, take action to provide their employees cost-free access to abortifacient drugs and devices (the "Mandate"), (c) in support of Hobby Lobby's and Conestoga's assertion of free exercise rights under the Religious Freedom Restoration Act ("RFRA") and (d) in support of the relief Hobby Lobby and Conestoga are seeking.

This Brief is in three basic parts. It first describes Westminster Theological Seminary and how it compares to Hobby Lobby and Conestoga, and then addresses (a) Hobby Lobby's and Conestoga's rights to be protected under RFRA and (b) the three key elements under RFRA[4] as they bear on whether the Mandate should be enforced against Hobby Lobby, Conestoga or Westminster.

Westminster Theological Seminary

Westminster is an exclusively graduate level Christian theological seminary in the Reformed tradition. It was founded in 1929 by a nucleus of theretofore faculty members of Princeton Theological Seminary

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4. Whether the Mandate (1) substantially burdens religious exercise; (2) furthers a compelling governmental objective; and (3) is the least restrictive means of furthering the compelling interest. 42 U.S.C. § 2000bb–1.

when Princeton Seminary veered from its historical commitment to orthodox Reformed theology toward a more liberal doctrinal orientation. Ever since that year, Westminster's mission has been to carry forward the legacy of what has come to be known as "Old Princeton," a legacy devoted to preparing ministers of the Word grounded in a commitment to the inerrancy and authority of the Bible as the Word of God and to the Westminster Confession of Faith and its Larger and Shorter Catechisms as accurately reflecting the system of doctrine to be found in Scripture.

A key element of Westminster's legacy and mission is that every human life is created in God's image and is impressed with that image at the moment of conception. Grounded in that understanding, Westminster also believes that taking a human life is an assault on God's image and thus on God, Himself. Westminster therefore opposes abortion and opposes the drugs and devices that are known to have abortifacient effect that the Final Rule now mandates be covered in whatever health plan Westminster provides to its employees. Westminster does not oppose all contraceptives, but it does oppose drugs and devices that prevent implantation of a fertilized human egg into the mother's uterine wall. In short, Westminster's theological conviction on this point is the same as that held by Hobby Lobby and Conestoga.

Moreover, Hobby Lobby and Conestoga illustrate the living out of faith that Westminster endeavors to inculcate. According to Westminster's theology, the church is not a building. It is the people of God, trusting and depending on Him in life and striving to honor Him by living lives of worshipful service and by obeying His commands. In

Westminster's view, the religiously grounded policies that impel Hobby Lobby and Conestoga to conduct their businesses in the God-fearing, Christ-honoring way they do is just the kind of heavenly citizenship, functioning on this side of heaven, that Westminster seeks to equip leaders of the church to promote.[5] As Westminster sees it, operating businesses in obedience to religious principles, as Hobby Lobby and Conestoga plainly do, is religious exercise in its fullest sense. Indeed, according to the Bible, work is to be performed not just to be paid, but to be in service to the Lord.[6]

Westminster differs structurally and functionally from Hobby Lobby and Conestoga in that Westminster is an educational, non-profit institution, indeed an institution that is devoted entirely to preparing students to serve Christian churches and their related ministries, primarily churches in the Reformed tradition, as ministers, teachers and counselors. Westminster operates a Christian book store, but it otherwise sells no products. It offers an entirely theological education to those pursuing God's call on their lives to serve His church and who meet Westminster's exacting academic and character standards. But Westminster sees itself in Christian brotherhood with Hobby Lobby and Conestoga, committed in the same way to the sanctity of life, to understanding work as an aspect of worship and in being opposed in the

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5. It is plain that religious principles suffuse the whole of Hobby Lobby's and Conestoga's business operations, not just their support for the sanctity of life and their opposition to being forced to facilitate its destruction.

6. Col. 3:23-24 -- "Whatever you do, work heartily, as for the Lord and not for men ... You are serving the Lord Christ."

same way to the government's attempt to force them to betray the Christian faith that so marks their operations.

ARGUMENT

I. The Government's Challenge to Hobby Lobby's and Conestoga's Rights to RFRA's Protections is Incongruous

The government raises the issue of whether for-profit corporations can have free exercise rights that are protected by RFRA. In Westminster's view, there are four points of incongruity in the government's contention that they cannot, any of which should be fatal to the government's position.

A. The Final Rule's Exemption for Churches is not Tailored to Protecting Religious Exercise

The first point of incongruity arises from within the Final Rule that mandates that Hobby Lobby and Conestoga act contrary to their religious convictions by providing cost-free abortifacients to their employees. The Final Rule exempts churches and their integrated auxiliaries from the challenged Mandate.[7] Inherent in

7. 45 C.F.R. 147.131(A) ("Religious employers. In issuing guidelines under Sec. 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a ``religious employer'' is an

exempting "Religious employers" ("churches" and their "integrated auxiliaries")[8] is clearly a nod toward protecting religiously grounded objections to providing all or some contraceptives. In other words, the driving assumption for the exemption is that forcing the exempted parties to comply with the Mandate would derogate their First Amendment and RFRA rights by requiring them to violate their faith convictions.[9] But, despite what the government claims is the reason for the exemption, the exemption, itself, does not accommodate any faith convictions, much less address whether complying with the Mandate would violate any such convictions.[10] The exempted parties are

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organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended."). http://www.hrsa.gov/womensguidelines/ ("Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code.")

8. Per the definitions in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code as they are referenced in the Final Rule.

9. This intention is further confirmed by the terms of the Final Rule's "accommodation" for non-church religious organizations if they self-certify that they object on religious grounds to providing abortion-causing drugs and devices.

10. As developed hereinafter, there are churches, even whole denominations, that are exempt from the Mandate but that do not oppose abortion or abortifacients.

exempted only and entirely on the basis that they (a) are organized as a particular type of entity with respect to income taxes and (b) operate as churches. They are not exempted because of any particular faith convictions they may hold and certainly not because they are opposed to abortions or abortion-causing drugs. In other words, the contours of the exemption do not relate to the purpose the exemption purportedly serves.

By contrast, the government does not contest that Hobby Lobby and Conestoga hold faith convictions that they would violate by complying with the Mandate, but they are not exempt, and the reason they are not exempt is because they (a) are distinct from their individual owners, (b) pay federal income taxes and (c) do not operate within the definition of churches under the Internal Revenue Code. Therefore, it is incongruous in the extreme that the Final Rule would exempt churches, simply because they are entities that are organized and operate in one way, but would deny Hobby Lobby and Conestoga exemption precisely because they are organized and operate in a different way, all with no regard to whether the Final Rule offends their faith convictions or not.[11] In neither granting the exemption in the one instance nor denying the exemption in the other instance, does the Final Rule accommodate any entity's religious convictions.

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11. Moreover, the distinction between non-profit and for profit entities arose more than a century after the Bill of Rights and should, therefore, not ground any discrimination under the First Amendment. http://www.irs.gov/pub/irs-soi/tehistory.pdf.

B. The Government's Position is Inconsistent as Between Free Exercise and Establishment Rights

The second point of incongruity in the government's position that Hobby Lobby and Conestoga have no religious liberty rights arises from the interplay within the First Amendment between the Free Exercise and Establishment Clauses. This Court has frequently found violations of the Establishment Clause by state action that displayed religious preference over the views of organizations as well as individuals. In other words, under the Establishment Clause, organizations are as entitled to seek protection from alleged violations as are individuals, and they are entitled to it without regard to whether they are churches or integrated auxiliaries of churches.[12] Yet, when it comes to the Free Exercise Clause of the same First Amendment, the government would have it that only individuals (and organized churches) may seek protection under its provision. To Westminster, it would hardly seem possible that non-church organizations could have the right to protection under one clause of the First Amendment, but not another. That should especially be so as to Hobby Lobby and Conestoga, which, although not churches in the traditional, organizational sense, exercise their religious faith in the way they function, including how they go about making a living, precisely where the

12. *McGowan v. Maryland*, 366 U.S. 420, 443 (U.S. 1961) ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious **organizations or groups** and ***vice versa***. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"). (bold emphasis added; italicized emphasis in original).

Christian faith is to be the most manifest and to have its most consequential effect. Those for-profit entities, along with many others, are exercising religious faith in the most basic and fundamental way it can be exercised, not hidden away within cloistered walls, in communication only with people who are like-minded, but openly, into the world, shining the light of faith as Christ commanded all Christians to do, as a beacon on a hill, for all to see, not hidden behind a bushel. Jesus said to His followers, "You are the light of the world. . . . Let your light shine before men in such a way that they may see your good works, and glorify your Father who is in heaven."[13] Hobby Lobby and Conestoga are "work[ing]" in just the way Christ commanded, for "the world" to "see" those "good works" and so glorify God. That is exercise of religion. Unless it is free, it cannot be exercise at all.

C. The Government's Position Invades and Assesses Religious Belief

The government's arch-argument for denying RFRA protection to for-profit corporations is misplaced; it even turns on a governmental assessment of religious beliefs that, itself, violates religious liberty. The government purports to deny Hobby Lobby and Conestoga any protection under RFRA because, in the eyes of the law, as corporations, they are separate persons from their owners. And they are separate regarding civil liability. Indeed, the primary rationale for doing business in corporate form is to limit the businesses' owners' liability to the amount of their capital investment in their business. But there is nothing about that arrangement that prevents

13. Matt. 5:14-16.

the owners from operating those businesses according to whatever those owners' value systems, including their religious convictions, may be. In fact, for Christians, how they operate their businesses is an expression of their religious worship.

The Great Commandment to Christians is to "love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength.[14] "Strength" there implicates work. Moreover, servants [here analogous to Hobby Lobby and Conestoga] are commanded to work for their masters [here analogous to their owners] "with sincerety of heart as you would obey Christ."[15] The point is that for the government to separate Christian owners from their work in terms of what in the government's view constitutes "religious exercise" as protected by RFRA, constitutes an invasion and assessment of the content of religious belief that it is well established government may not do.[16] RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[17] Hobby Lobby's

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14. Mark 12:30. See also, Matt. 22:37 and Luke 10:27. This commandment is not limited to Christians. It also appears in the Old Testament. Deut. 6:5.

15. Eph. 6:5. See also, Col. 3:22 and 1 Pet. 2:18.

16. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("[T]he statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'")(internal citations omitted).

17. 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

and Conestoga's operations of their businesses according to their religiously guided policies is, according to their and their owners' Christian faith, an exercise of religion. For the government to contend that a Christian's work is not religious exercise necessarily invades the validity of that faith conviction.[18] In short, it is a far leap, even an impermissible leap, for government to deny protected religious liberty based on how business owners limit their civil liability.[19]

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18. For example, Westminster is committed to the Westminster Confession of Faith and its Larger and Shorter Catechisms as accurately expressing the system of doctrine provided by Scripture. Chapter XIX of the Confession of Faith provides that the law of God is "a rule of life informing them of the will of God, and their duty, it directs and binds them to walk accordingly." "Walk[ing]" according to God's moral law includes what is done in work. Moreover, according to Chapters XIX and XX, those who act contrary to God's law are subject to discipline by church government. In this instance, that means the owners of Hobby Lobby and Conestoga are exposed to discipline by their churches for what is done by their businesses.

19. The government's argument is also flawed from a secular perspective. There are different kinds of for-profit entities, and the different kinds harbor different degrees of separation from their owners. "C" corporations pay taxes separately from their owners. "S" corporations and limited liability companies do not. Limited liability companies do not even have owners. They have members, and the members directly manage the companies. To accept the government's "separation" argument for denying religious liberty protection to Hobby Lobby and Conestoga would invite hinging religious liberty on distinctions in corporate forms that would seem to have little relevance to the point in issue. Moreover, the "separation" point applies equally to religious entities that are organized as corporations. Some of them are exempted from the force of the Mandate. Westminster, itself, is a corporation. The "separation" point must fail. The only practical difference

D. The Government's Position Impermissibly Shrinks RFRA's Scope

Hobby Lobby and Conestoga are citizens who should enjoy the Constitution's guarantees of liberty, including that of freely living out their faith, and Westminster submits they are entitled to protection from the Mandate by the provisions of RFRA. Since much of the life of this Country is lived out through corporate activities, if Hobby Lobby and Conestoga are denied religious liberty protection in these cases, it will substantially diminish the salutary role the Founders envisioned free exercise would have, and that it currently does have, in the life of this Nation.

Not only would a founding thread of this Nation be impaired if for-profit corporations were denied protection of religious liberty here, the idea that the government would sacrifice that seminal thread not simply to enable women to abort their possible pregnancies without cost, but to coerce religiously committed employers to encourage their employees to abort their pregnancies by providing cost-free ways to do so, is unthinkable to Westminster.

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between Hobby Lobby and Conestoga and "religious" corporations is that Hobby Lobby and Conestoga pay federal income taxes. That is a mark of citizenship. It should not be disqualifying from constitutional and statutory protections.

II. The Mandate Substantially Burdens Religious Excercise

On pain of fines and penalties that would destroy Westminster if imposed, save only the recent injunction that protects it, the Mandate would require Westminster, along with Hobby Lobby and Conestoga, to take action to provide its employees cost-free access to abortifacient drugs and devices – means of destroying human life. It is action that would violate Westminster's core faith convictions.

Westminster is constrained to note at the outset on this point that it is stunned the federal government would be so determined to induce women to terminate their possible pregnancies that it would endeavor to force Hobby Lobby and Conestoga, as well as Westminster, to participate in that scheme with respect to their employees. Hobby Lobby's and Conestoga's ability to operate their businesses as they do, as well as Westminster's ability to teach as it does, depends on their constitutional (and RFRA) guarantees of religious liberty. The sanctity of life is at the heart of what Westminster stands for. Westminster believes that the second Person of the triune God took on human nature and lived as a man in perfect obedience to the Father and died sacrificially that humans could have life and have it abundantly and eternally. The government, the guarantor of Westminster's freedom to believe, and live out its belief, that every life is sacred, now means to coerce Westminster into opposing life. Two businesses now before this Court, as well as many others for whom they stand, function at the high level of citizenship they do because their policies are Christ-centered. That is what drives them to the high ethical standards they keep.

It is what impels them to respect their customers and employees regardless of their gender, their race or their station in society. It is virtually incomprehensible and deeply concerning to Westminster to see the government, whose citizenry is being so well served by the way these companies conduct their business, and, in Westminster's view, by the way it, itself, labors to prepare its students for their service to the Lord, coercing these companies and Westminster to betray the faith convictions that cause them to be what they are and to do what they do. The coercion at this point is also concerning to Westminster as a portent of what further encroachment on religious liberty may yet be in store.

This Honorable Court has previously concluded that the Constitution carries a penumbra that harbors a right of privacy that gives women the constitutional prerogative to terminate their pregnancies. Westminster has always disagreed with that conclusion, but it has also always been free to voice its opposition to that conclusion. It has never been forced to support that conclusion. Now, though, the Mandate brings a new dimension for Westminster, a dimension that coerces Westminster to act against its religious convictions. And the coercion is extreme. It entails an avalanche of fines and penalties so severe that, if they are levied on Westminster, would cause Westminster, itself, to die. That is far different from granting individual women the prerogative to terminate their pregnancies. If this Court rejects the protective relief Hobby Lobby and Conestoga are seeking, it would not be a holding that enables liberty. It would be a holding that denies liberty. And not only that, it would be a holding that would contribute to the coercion on those entities (and Westminster) to participate in the government's effort to

terminate human lives and thereby betray their devotion to the Lord of life.

Save only the injunction recently entered, the Mandate places Westminster in a position reminiscent of Polycarp, a second century bishop in the Christian church who was charged by the Roman government with the criminal offense of being a Christian but who was offered a reprieve if he would only utter two words: "Caesar Kurios" – "Caesar is Lord." Understanding that saying those words would violate his faith, and by virtue of his leadership position in the church would undermine the church, Polycarp refused to say those words, and the Roman government burned him at the stake. So it is with Westminster. Its government is attempting to require it to act contrary to its faith convictions and, by virtue of its position of leadership in service to the Christian church, to undermine its faithfulness to the church it is dedicated to serve. If Westminster does not comply, the government threatens to destroy it. Coercion on Westminster to violate the integrity of its faith is burden enough. The threat of its destruction only makes it worse. The burden the Mandate imposes on Westminster could hardly be more substantial. Possibly varying only in degree, the same is true for Hobby Lobby and Conestoga.

III. The Mandate Does Not Further Any Legitimate Governmental Objective

Having imposed a substantial burden on Westminster's (and Hobby Lobby and Conestoga's) religious exercise, the federal government is required under RFRA to demonstrate that imposing that burden is the least restrictive means by which the government can further

valid, even compelling, governmental objectives. The government has asserted that it means for the Mandate to serve two objectives: (1) to promote the health of women and (2) to promote gender equality.[20] Leaving aside for the moment whether either of those is a valid governmental objective, it appears to Westminster that the Mandate does not and cannot further either of those objectives.

A. The Mandate Does Not Promote Women's Health

As for women's health, the government does not suggest that abortifacients protect women from any health risk of pregnancy. All abortifacients do is avoid or terminate pregnancies. Pregnancies carry health risks, but pregnancies, themselves, are not diseases. They are not maladies. They are rather at the fulcrum of perpetuating life. The government certainly knows this and so asserts a more narrow contention. The government's notion of how the Mandate promotes women's health arises from the purported observation that some women who have carried unwanted pregnancies have engaged in self-destructive behaviors that the government relates to their not wanting their pregnancies.[21] Therefore, as the

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20. 45 CFR Parts 147 and 156 [CMS-9968-F] RIN 0938-AR42 ("[T]he contraceptive coverage requirement serves two compelling governmental interests. The contraceptive coverage requirement furthers the government's compelling interest in safeguarding public health by expanding access to and utilization of recommended preventive services for women. ... The government also has a compelling interest in assuring that women have equal access to health care services.").

21. 45 CFR Parts 147 and 156 [CMS-9968-F] RIN 0938-AR42 ("As documented in the IOM report, 'Clinical Preventive

government's argument goes, the Mandate promotes women's health because making abortifacients cost-free will enable women who want to be sexually active but do not want to be pregnant will avoid the risks of self-destructive behaviors by stopping pregnancies that may later contribute to their engaging in such behaviors. The motivation to use the abortifacients, however, would be to avoid pregnancy. That is what abortifacients do. But pregnancies, themselves, are not, themselves, a health problem, and are certainly not the health problem the government purports to identify. The health problem consists rather in the self-destructive behaviors the government says have been known to attend unwanted pregnancies. The motivation by those using abortifacients is to avoid pregnancy, not to avoid their own supposed, possible, subsequent self-destructive behaviors that might attend an unwanted pregnancy. Therefore, by contending that using abortifacients will guard against the adverse health effects of self-destructive behaviors by avoiding pregnancy, the government, in effect, is purporting to protect women's health without their knowing it.

The government's argument is a stretch, even at that point, but there is more. For the Mandate to have any chance of furthering the government's objectives, women who have been sexually active and think they might be pregnant but do not want to be, must actually use the abortifacients. The Mandate, however, does not require anyone to actually use them. What the Mandate requires

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Services for Women: Closing the Gaps,' women experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may be less motivated to cease behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks.").

is that employers provide health plans to their employees that make abortifacients available to those employees on a cost-free basis.

But all of these abortifacients are already readily available. They are on drug store shelves everywhere. Any woman (or girl) who wants to use one of them can easily do so. Therefore, if the Mandate is to further the government's purported objectives, it must be that making the abortifacients available without cost is the factor that actually induces women who have been sexually active and think they may be pregnant, but do not want to be, to go to a store and acquire one of the abortifacients and use it, when they would not have taken that action if those products came with a cost. At that point, the government's contention becomes one of sheer speculation. And sheer speculation cannot suffice for what RFRA requires the government to demonstrate.

The category of women whom the government contends the Mandate will induce to use abortifacients because they are cost-free when they otherwise would not consists of women who have been sexually active and who do not want to be pregnant but who have not availed themselves of any of the other widely available means of contraception. But if it is the cost-free aspect that would induce women to use abortifacients when at a cost they would not, then the same expectation would attach to women's use of other contraceptives – that is, the cost-free aspect of other contraceptives would prompt women to use those contraceptives. Yet it usually only makes sense to use abortifacients if women have not used some other form of contraception. It is improbable, to say the least, that if contraceptives are all made available without

cost, as the Final Rule requires, women who want to be sexually active but not be pregnant would not be induced by that cost-free aspect to use one form of contraception but then would be induced by that same cost-free aspect to use an abortifacient. That is nonsensical. There is self-evidently very little reason, if any, to expect the cost-free aspect of abortifacients to cause the targeted category of women to use them when those women would have already demonstrated that the cost-free aspect of other forms of contraception did not induce them to use any of those other such forms.

If anything, women who have not used a previous form of contraceptive, but who have been sexually active and think they may be pregnant but do not want to be – the so-called "emergency" situation – and who want to resort to an abortifacient to escape that emergency, would not be deterred from doing so by some level of monetary cost. That is especially so for women affected by the Mandate, because the Mandate is addressed to employers and, as a result, all of the women affected necessarily have paying jobs. Therefore, in all likelihood, any woman affected by the Mandate who finds herself in the "emergency" of possibly being pregnant and not wanting to be, and who wants to use an abortifacient to address her emergency, will not forego using it because of its cost. In short, the Mandate to provide cost-free abortifacients has not been shown, and almost certainly cannot be shown in actuality, to further the objective of protecting women from engaging in self-destructive behaviors that are purportedly sometimes associated with unwanted pregnancies. The chain of assumptions on which the government relies is no better than highly speculative. At a realistic level it would appear to defy human nature.

B. The Mandate Does Not Promote Gender Equality

The same infirmity that impeaches the government's argument for the health of women also impeaches its argument for gender equality. If the cost-free aspect of abortifacients cannot reasonably be expected to prompt women to use them for supposed health reasons, it can no more be expected to prompt women to use them for gender equality reasons. But beyond that, government has no valid objective to promote gender equality in the broad terms it describes as a reason to require employers to make abortifacients available cost free to their employees.

What government can legitimately do for the sake of equalizing between citizen classifications must be narrowly tailored to address their "legal rights," not some broad social dynamic.[22] This principle applies to

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22. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-309 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating ***where feasible***, the disabling effects ***of identified discrimination***. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by ***specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past***. We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative ***findings of constitutional or statutory violations***. See, *e. g.*, *Teamsters* v. *United States*, 431 U.S. 324, 367-376, 97 S. Ct. 1843 (1977); *United Jewish Organizations*, 430 U.S., at 155-156, 97 S.

governmental efforts at gender equality.[23] And, within its legitimate sphere of protecting pregnant women from discrimination, the government has already acted by enacting The Pregnancy Discrimination Act of 1978.[24] As its name connotes, that statute recognizes that pregnancy is a gender distinctive, and the statute operates not to eliminate pregnancy's gender distinctiveness but to prohibit discrimination related to it.[25] The Mandate, however, does not note, or guard against, any discrimination against women because they are or may be pregnant. The Mandate rather skates past any threat of discrimination to remove the inherent gender difference between men and women when it comes to pregnancy – by

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Ct. 996 (1977); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since ***the legal rights of the victims must be vindicated. ... Without such findings of constitutional or statutory violations***, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."). (emphasis added).

23. *Califano v. Webster*, 430 U.S. 313, 317 (1977) ("[W]e have rejected attempts to justify gender classifications as compensation for past discrimination against women ... when the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination.").

24. 42 U.S.C. § 2000e (k) (providing in pertinent part: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment--related purposes ....").

25. Racial differences are similar, and the federal government has acted similarly regarding them, not by purporting to eliminate the differences between races, but to prohibit discrimination related to those differences.

providing a cost free means of removing pregnancy, itself. Government may legitimately pursue the former. It may not legitimately pursue the latter.[26]

By contending that the Mandate supports a governmental stake in gender equality is to flip the whole principle of protecting women from discrimination on its head. The Mandate does not purport to protect women from discrimination based on their being women or based on their being pregnant. What it purports to do is to provide women a cost free way to avoid exercising an aspect of their womanhood - their unique capacity to bear children. Promoting gender equality in that way does not, and cannot, legitimize the Mandate.

But beyond that, abortifacient use can never achieve gender equality when it comes to pregnancy avoidance. Abortifacients can terminate an existing pregnancy. There is nothing a man can ingest that will terminate a pregnancy. In short, the whole idea that government can create gender equality by making abortifacients available

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26. The government cites *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) to justify its version of gender equality as a compelling governmental interest under the Mandate. In that case the Court addressed a Minnesota statute that prohibited the Jaycees from a rule of all male membership on the basis that the rule "deprive[d] persons of their individual dignity and denie[d] society the benefits of wide participation in political, economic, and cultural life." As the Court stated, the point was to redress a "stigmatizing injury, and the denial of equal opportunities that accompanies it" when women "suffer[] discrimination on the basis of their sex." The point was to ***protect women from discrimination*** based on their gender, including all the fullness of what their gender entails, ***not*** to promote women's ability ***to avoid discrimination*** by removing an aspect of that fullness such as their ability to bear children.

to women, with or without cost, is fantastical. It is simply an impossible pursuit for government.

But even if the government could demonstrate that the Mandate actually furthers a legitimate governmental objective, RFRA requires the government also to demonstrate that the Mandate is the way that (a) will least restrict Westminster's (and Hobby Lobby's and Conestoga's) religious exercise and (b) will induce women (i) who have been sexually active and think they may be pregnant but do not want to be (ii) to use abortifacients (iii) because they are cost-free (iv) when otherwise they would not. It is clearly not the least restrictive way.

IV. The Mandate is Not the Least Restrictive Means to Further the Government's Stated Objectives

All churches and their integrated auxiliaries are exempt from the Mandate. None of their employees will have cost-free access to abortifacients via government coercion of their employers to provide it. Therefore, if the Mandate is to be sustained, it must be that removing all employees of all organized churches and their integrated auxiliaries from the Mandate's reach, without regard to whether their employers have a religious objection to providing cost-free abortifacients to those employees, is consistent with the Mandate's furthering the government's objectives. But if it is, it is difficult to see why coercing religious employers who are not structurally part of a traditional form of church, and therefore are not exempt, would be vital to furthering those objectives.[27]

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27. The Final Rule also offers what it calls an "accommodation" to "eligible employers" – non-profit employers who provide a "self-certification" of their qualifications to be spared the Mandate's

Moreover, churches and their integrated auxiliaries have supposedly been exempted to protect their free exercise of religion.[28] But when it comes to belief in the sanctity of life, no church could hold that belief more dear than Westminster, Hobby Lobby and Conestoga indisputably do. If anything, Westminster (and Hobby Lobby and Conestoga) have a far more discernable aversion to abortifacients than do churches, at least measured against the sole criterion that they are churches.

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force, mainly by stating that they oppose abortifacients on religious grounds. It is a perverted scheme, because by the very act of self-certifying to a religious objection to abortifacients, such employers actually cause abortifacients to be provided to their employees on the cost-free terms the Mandate requires. In the Final Rule's own terms, such self-certification "***complies*** . . . with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage." 26 CFR §54.9815-2713A (emphasis added). The perversion further underscores the irrationality of the Final Rule's supposedly religiously deferential classifications. It "accommodates" only superficially. In reality, it "accommodates" nothing. But, if it is perceived as a real accommodation, it further reveals that protecting religiously objecting employers from the Mandate is consistent with furthering the government's professed objectives, so classifying Hobby Lobby and Conestoga differently and denying them that protection, despite their religious objections, is not rationally consistent with furthering those objectives.

28. "[T]he regulations advance [the government's stated] interests in a narrowly tailored fashion that protects certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage." 45 CFR Parts 147 and 156 [CMS-9968-F].

It is well known that many institutional churches have little, if any, opposition to abortion. Indeed, Presbyterianism provides a clear example. In 1929, Princeton Theological Seminary was a Presbyterian denominational seminary. It was governed by what was then the United Presbyterian Church in the United States of America, which has since merged with the former Presbyterian Church in the United States to constitute the now Presbyterian Church (USA) ("PCUSA"). As an outgrowth of the turn for liberalism Princeton Theological Seminary made in 1929 that triggered Westminster's founding, the PCUSA is today very tolerant of abortion.[29] The Unitarian church is as well.[30] And there are others. Yet, the Final Rule exempts all churches within those denominations, not because they have any doctrinal aversion to abortifacients (they have none), but simply because they are churches in a structural sense. Therefore, by exempting churches who do not oppose abortifacients, but refusing to exempt Westminster, an institution that entirely serves the church but is opposed to abortifacients, the Final Rule denies employees of employers who do not oppose using abortifacients the cost-free aspect of using

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29. The PC (USA) is rather accepting of abortion. It more honors a "woman's right to choose" than it does the sacredness of human life. See the PC (USA)'s statements on abortion at http://www.presbyterianmission.org/ministries/101/abortion-issues/ (last visited on January 14, 2014) ("Humans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy.").

30. http://www.uua.org/statements/statements/14499.shtml (last visited on January 14, 2014) ("[T]he 1987 General Assembly of the Unitarian Universalist Association reaffirms its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy.").

them and requires the cost-free aspect of using them to be provided to employees of employers who staunchly oppose them. There is no rational justification for such a distinction, at least not a justification that relates to the government's supposed objectives. If rationality is required to sustain classifications between groups to which a law's benefits or burdens either do or do not apply, and it is,[31] then the Final Rule's classifications that exempt the categories it does and imposes its force on the categories it does, cannot be sustained. Exempting churches, simply because they are churches without any connection to what their faith convictions may be regarding the sanctity of life as it bears on using abortifacients, but refusing to exempt employers such as Hobby Lobby and Conestoga, and certainly such as Westminster, that have long exhibited their conviction that every life, from conception, is made in God's image and should not be destroyed, is even more nonsensical. But either way, such irrational distinctions cannot effectively ground any restriction on religious exercise, much less provide the "least restrictive" imposition on religious exercise.

Once the government recognizes, as it has in the very terms of the Final Rule by exempting organized churches and their integrated auxiliaries, that whatever interest the government has in providing cost-free access to abortifacients can be furthered without coercing employers to act contrary to their core religious convictions, it can no longer be sensibly argued that not exempting other

31. *Johnson v. Robison*, 415 U.S. 361, 374 (1974) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'").

religiously based objectors is essential to furthering the government's objectives. It can most assuredly no longer be sensibly argued that exempting some entities simply because they are organized as churches, without regard to whether the Mandate conflicts with their religious beliefs, is rationally consistent with refusing to exempt non-church employers who do oppose abortifacients and coercing those employers to act contrary to their core faith convictions. At a minimum, such a topsy-turvy exemption scheme is not the way for the government to induce women to use abortifacients that is the least restrictive on religious exercise.

CONCLUSION

The government's position that Hobby Lobby and Conestoga have no right of religious liberty is fatally incongruous. By requiring Hobby Lobby and Conestoga to betray their faith convictions is substantially burdensome on the religious exercise that consists in how they operate their businesses. By requiring them (and Westminster) to violate their faith convictions the Mandate not only substantially burdens their religious exercise but threatens their very existence.

The Mandate furthers no compelling government objective, and, even if it did, it is hardly the least restrictive way on Westminster's (and Hobby Lobby and Conestoga's) religious exercise of going about it. The Mandate is predicated on twisted and unrealistic assumptions, and the exemption scheme it incorporates is irrational. Under RFRA's requirements, to say nothing of First and Fifth Amendment rights, the Mandate should not be enforced against Hobby Lobby, Conestoga or Westminster.

Respectfully submitted,

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